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IN THE

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Interest of *Amicus Curiae*

The Attorney General of the State of New York submits this *amicus* brief in support of the position advocated by Petitioner Sedima, S.P.R.L. ("Sedima") that this Court adhere to the plain meaning and liberal construction mandate of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). In submitting this brief, New York State registers its concern lest the scope and applicability of civil RICO, 18 U.S.C. § 1964(c), be unduly restricted. We adopt the reasoning and conclusions of the *amicus* brief submitted by the Attorney General of the State of Arizona and offer additional grounds in support thereof.

New York State, like other states, struggles to provide appropriate services to its citizens without imposing excessive tax burdens. Its financial resources are limited. The State and its citizens can ill afford the loss of revenues caused by the unlawful conduct RICO was designed to redress.

The State and its citizens suffer serious injury when funding for state programs is diverted, or costs thereunder are inflated, by fraud, bid-rigging schemes, bribery, kickbacks and other forms of official corruption. These losses are multiplied by ancillary expenditures for, *e.g.*, substantial numbers of additional law enforcement personnel, firefighters and emergency service employees and auditors, accountants and analysts required to investigate and handle incidents of arson, fraud and other forms of racketeering activity. Civil RICO affords state and local governments a valuable tool to recover these losses. Its treble damage remedy also serves as a powerful deterrent by making the expense of doing business through proscribed conduct prohibitive.

The State also has an interest in seeing that its citizens have the incentive and the means to seek redress when they are injured by conduct that violates RICO. Private parties injured by such conduct play an important role in the administration of justice when they are able to supplement the efforts of responsible officials by instituting appropriate private actions. Their incentive to do so should not be curtailed by decisions that vitiate their ability to recover damages from racketeering activity.

RICO is uniformly recognized by state attorneys general as a pre-eminent addition to existing legal sanctions. State and local governments have made effective use of civil RICO.[1] The Second Circuit decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), along with the opinion in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), severely undercuts the ability of state and local governments to use civil RICO as a means of eliminating and deterring the pernicious consequences of fraud, official corruption and other proscribed forms of racketeering activity.

Statement

The Court is respectfully referred to the brief of Petitioner Sedima for a statement of the factual background and legal proceedings below.

The petition herein raises the following questions:

1) Is a criminal conviction requisite to a private civil RICO action?

1. *See, e.g., City of Milwaukee* v. *Hansen*, Civ. No. 77-246 (E.D. Wis. 1981); *State of Maryland* v. *Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980).

2) Does RICO require "something more" than, "different" or "distinct" from injury caused by the predicate acts and the unlawful engagement in an enterprise?

In our view, issues of statutory construction are necessarily implicated by the criminal conviction and distinct-injury questions. For purposes of orderly presentation, we will address that matter first and then respond to the two questions presented.

Summary of Argument

RICO was intentionally drafted in broad terms and with a mandate for liberal construction unique in federal criminal statutes. The plain language of RICO applies to a broad range of conduct, and is not susceptible to restrictive interpretations which avoid overinclusion yet preserve its key purposes.

Criminal convictions are not a prerequisite to private civil RICO suits and serve only an evidentiary function in civil actions brought by the United States. Additionally, by the plain meaning of RICO's terms, treble damages are recoverable for injury proximately caused by a confluence of a pattern of racketeering activity and unlawful participation in an enterprise.

ARGUMENT

I. RICO Is Unambiguous and Must Be Liberally Construed.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), was enacted in 1970 as Title IX of The Organized Crime Control Act. It is apparently unique among federal criminal statutes in that it contains an explicit directive that it be liberally construed. Pub.L. 91-452, Section 904(a), 84 Stat. 947 (1970). Further, it is accompanied by a congressional statement of findings and purpose, 84 Stat. 923 (1970), which heralds the effectiveness of RICO's "enhanced sanctions and new weapons" in the fight against organized crime and the pervasiveness of racketeering activity.

This Court has recognized the "significance of the statement of findings and purpose[,] *United States* v. *Turkette*, 452 U.S. 576 [(1981)]," *cited* in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 302 (1984), and that Congress purposefully "utilized terms of breadth," in drafting the statute. *Id.* at 300. There are, indeed, no "textual pegs" on which to hang a restrictive reading. *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *petition for cert. granted*, 105 S.Ct. 902 (1985).[2]

Section 1964(c), commonly referred to as "civil RICO," provides:

> Any person injured in his business or property *by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.[3]

(Emphasis added). Petitioner raised two principal questions: first, whether a criminal conviction for RICO pred-

2. *Sedima* and *Haroco* are scheduled to be argued together before this Court.

3. Section 1961 defines the key elements under consideration as follows:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . . ;
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5)"pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Section 1962 provides in relevant part:

> Prohibited activities.
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

icates, or for a RICO violation, is a prerequisite to a civil RICO action and second, whether compensable RICO injury must be "something more" than, "different" or "distinct" from injury caused solely by the predicate acts and the unlawful use of an enterprise.

The relevant principles of statutory construction caution that the language of the statute predominates:

> "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed. 2d 246 (1981), quoting from *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). See, also, *Dickerson* v. *New Banner Institute, Inc.,* —— U.S. ——, ——, 103 S.Ct. 986, 990, 74 L.Ed.2d 845; *Lewis* v. *United States,* 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980).

Russello v. *United States,* 464 U.S. 16, 104 S.Ct. 296, 299 (1983). This Court has also noted that broad general language of a statute is not ambiguous where congressional objectives require broad terms. *Diamond* v. *Chakrabarty,* 447 U.S. 303 (1980).

The language of RICO is plain on its face; the issue is not ambiguity but rather the extensiveness of the statute's applicability. We respectfully submit that proponents of a restrictive reading do not find in the legislative history the clear expression of contrary intent necessary to support their position. They fail to distinguish between legislative *debate* and legislative *intent. See, Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 203 n.24 (1976).

Initially, the court below in *Sedima* did not point to any actual statutory ambiguity,[4] but substituted a different rationale to justify culling the legislative history, stating: "The law itself calls for reference to legislative intent since the liberal construction clause states that the text should be construed to 'effectuate its remedial purpose.'" 741 F.2d at 488. Ironically, *Sedima's* review accomplishes the opposite result. In the absence of clearly expressed legislative intent contrary to RICO's plain meaning, *Sedima* finds only "[t]he clanging silence of the legislative history," *id.* at 492, to bolster its restrictive view, or relies on specific positions advocated by individual legislators during the course of lengthy congressional hearings. As Judge Pratt stated in *Furman* v. *Cirrito,* 741 F.2d 524, 533 (2d Cir. 1984), *petition for cert. filed,* October 1984:

> The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combatting organized crime. *United States* v. *Turkette,* 452 U.S. at 586-87, 101 S.Ct. at 2530-31 (1981).

(*quoting Schacht* v. *Brown,* 711 F.2d 1343, 1361 (7th Cir.), *cert. denied,* —— U.S. ——, 104 S.Ct. 508 (1984)). Particularly in light of the liberal construction mandate, this Court cannot rely on legislative silence as evidence of *Congress's* intention to read civil RICO narrowly.[5]

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4. In its discussion of the conviction requirement, *Sedima* suggests that some of the statutory language is susceptible to a "plausible alternative view." We submit that the court is incorrect and that such "reading" of the statute is not the equivalent of statutory ambiguity. *See,* discussion, *infra,* p. 9.

5. We submit that *Sedima's* proposed principle of statutory construction, *i.e.*, "clanging legislative silence" in lieu of "clearly expressed legislative intent contrary" to a statute's plain meaning, is a

(footnote continued on next page)

II. Civil RICO Does Not Require Prior Criminal Conviction.

Sedima holds that prior criminal conviction is requisite to civil RICO actions, a proposition which *Haroco* declined to follow. We submit that this requirement does not, and should not, exist.

First, the statutory language setting forth the civil remedies nowhere requires criminal conviction as a precondition to a civil RICO action. Subsection 1964(a) provides the district court with expanded equitable jurisdiction; subsection 1964(b) authorizes United States civil suits and certain provisional remedies; and subsection 1964(c) authorizes a private right of action, recovery of treble damages and attorney's fees. None of these subsections even refers to criminal convictions. Most notably, § 1964(c) explicitly refers to injury caused by a RICO *violation.* Subsection 1964(d) does in fact make reference to criminal convictions, there denominated "final judgment or decree," not as a *requisite* of a private civil suit, but as a *method of proof* in civil cases brought by the United States. Section 1964(d) provides:

> A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(footnote continued)

dangerous alternative. It gives courts *carte blanche* to rewrite legislation whenever they *deem* the legislative history insufficiently extensive. This produces the absurd result of forcing Congress to engage in lengthy debate in order to prevent judicial disregard for the plain meaning of statutory terms. It produces the even more absurd proposition that plain language does not control, *silence does.*

Contrary to *Sedima's* contention that the legislature did not consider the matter, Congress actually contemplated the role of criminal convictions in civil RICO suits and specifically limited their use to an evidentiary function. In the face of this explicit reference, we submit there is no "peg" upon which to hang a requirement that private civil actions be based on criminal convictions.[6]

On this crucial issue, the *Sedima* court does not claim there is statutory ambiguity but rather asserts its position as a "*plausible alternative view* of the words 'indictable' and 'chargeable' . . ." (as used in the definitions of racketering activities, 18 U.S.C. § 1961(1)), 741 F.2d at 500. (Emphasis added). This basis for substitution of judicial interpretation for legislative intent is impermissible. As Judge Cardamone suggested in his vigorous dissent, in defining racketeering activity, Congress could simply have "used the phrase 'for which an indictment or information has been *returned* or *filed*' " and could likewise have said " 'for which the defendant has been criminally *convicted.*' " 741 F.2d at 505. Simply put, " 'Congress did not write the statute that way.' " *Russello* v. *United States,* 104 S.Ct. at 300, quoting *United States* v. *Naftalin,* 441 U.S. 768, 773-74 (1979).[7]

Sedima's holding, if affirmed here, would have a seriously deleterious effect on the criminal justice system.

6. Although Congressman Mikva observed during the course of congressional hearings that "there need not be a conviction under any of these laws for it to be racketeering," 116 Cong. Rec. 35342 (1970), no member of Congress proposed an amendment which would have required criminal conviction as a requisite to private civil actions.

7. When Congress wanted to use the term "conviction," it did. *See* 18 U.S.C. § 1963(c) ("Upon conviction . . . under this section, the court shall authorize the Attorney General to seize all property or other interest . . . .")

First, victims who had been injured by RICO violations would have little recourse but to press prosecutors for convictions. Second, the conviction requirement would impose extraordinary burdens on prosecutors precisely because victims' rights would depend on their decisions. For example, convictions might be more difficult to obtain because the complainant-victim's credibility as a trial witness would be subject to attack on the ground that his ability to recover treble damages depended on conviction. Third, the victim would be unfairly affected by a decision by the government to terminate a prosecution in return for a grant of immunity or where a defendant is willing to turn State's evidence and aid the prosecutor, perhaps on entirely unrelated matters. In such a case, a victim, however severe his injuries, would remain uncompensated.

There are, moreover, many cases in which proceedings end by virtue of a procedural defect or a failure of proof. Such prosecutions might be reinstated, but the burden of doing so would unduly tax, or upset the priorities of, limited prosecutorial resources already committed to other matters. Typical examples include cases where

a) the evidence presented before the grand jury was not legally sufficient. (N.Y. Crim. Proc. Law § 210.20).[8]

b) the grand jury proceedings were legally defective because a quorum was not present; less than twelve jurors concurred in the findings of an indictment; defendant was not accorded an opportunity to appear before it; or because other reasons impaired the integrity thereof or prejudiced the defendant (N.Y. Crim. Proc. Law § 210.35).

8. The Federal Rules of Criminal Procedure and most state laws contain provisions which are identical or analogous to the New York State Criminal Procedure Law provisions referred to in subparagraphs a)- f).

c) some evidence was suppressed and witnesses who might testify to facts relating to suppressed evidence were outside the jurisdiction. (N.Y. Crim. Proc. Law § 710.20).

d) a mistrial had been declared.

e) defendant's statement was deemed "involuntary," and the prosecution decided it could not, or for some reason would not, prosecute.

f) the court lacked jurisdiction over the matter (N.Y. Crim. Proc. Law § 210.25(2)) and it had to be turned over to another prosecutor.

In all of these examples, persons injured by defendants' conduct would be entirely blameless but would be unable to alter the fact of non-conviction, irrespective of whether it resulted from prosecutorial errors or appropriate prosecutorial decisions. The connection between conviction and civil recovery should not sensibly hinge on such factors.[9]

9. *Sedima* supports this conviction requirement on yet another ground, citing the post-enactment adoption by the Department of Justice of guidelines regulating the criminal use of RICO. *See United States Attorneys' Staff Manual, Executive Office of the United States Attorneys, RICO Guidelines* (Jan. 30, 1981) ("Guidelines"). Insofar as *Sedima* contends that the conviction requirement would reflect those Guidelines, its reasoning is fallacious. The Justice Department Guidelines apply only to *federal* prosecutors and only concern the question whether they bring criminal *RICO* actions. They do not limit prosecutions for the underlying predicate acts and state prosecutors are not affected by the Guidelines.

The reference to the Guidelines raises another point. The apparent purpose of the conviction requirement is to guarantee that there are some operative guidelines for civil actions. Assuming *arguendo* that prosecutorial discretion is an appropriate criterion for limiting civil actions, the requirement of a conviction is overly restrictive. The Guidelines speak to the issue of *initiating* criminal RICO suits, an arguably more relevant inquiry, because it focuses on the proper exercise of prosecutorial discretion. A prosecution may have been properly initiated within the Guidelines, but might not have gone to conviction on innumerable grounds. *See* discussion, pp. 10-11. Because actual convictions reflect only a small number of cases in which prosecutorial discretion has been exercised in favor of the institution of criminal proceedings, it is the wrong trigger for civil actions.

The structure of RICO purposely provides alternative civil and criminal remedies for RICO violations in recognition of the differing but equally valuable results that each may provide. In some instances, ruinous treble damage recoveries aimed at making crime unprofitable may well be more effective than incarceration in curtailing racketeering activity. The linkage between conviction and civil recovery advocated by *Sedima* eliminates all possibility of utilizing § 1964 monetary sanctions where criminal proceedings end in anything less than conviction. This result cuts the heart out of the statute.

There is no indication that Congress, in forging new and powerful weapons in its attack on racketeering activity, intended to make victim recovery dependent on the vagaries of criminal proceedings. Weighed against the total absence of any congressional intent to require criminal conviction as an antecedent to civil RICO must be the problems posed by such requirement, which simply put, are devastating. In the absence of constitutional infirmity[10] and of clearly expressed legislative intent contrary to the plain meaning of the statute, this Court should reject criminal conviction as a requisite of civil actions.

10. In *United States* v. *One Assortment of 89 Firearms*, —— U.S. ——, 104 S.Ct. 1099 (1984) this Court has sustained the constitutionality of "impos[ing] both a criminal and civil sanction in respect to the same act or omission," *Sedima*, 741 F.2d at 507 (Cardamone, J., dissenting), in the face of double jeopardy (and collateral estoppel) claims after defendant was acquitted.

III. Civil RICO Does Not Require a "Distinct" or "Different" Injury.

The other issue raised by *Sedima* concerns the nature of compensable injury under civil RICO, *i.e.*, the import and scope of the phrase "injured in his business or property by reason of a violation of section 1962 . . . ." We submit that through a process of sophisticated, albeit misdirected, analysis, the Second Circuit has turned a simple statement of proximate cause into an unsupportable limitation on civil RICO recovery. In our view, § 1964(c) means just what it says and requires that plaintiff show it was proximately injured by a confluence of the predicate acts and the other elements of a RICO violation. This proposed formulation, articulated but not followed in *Bankers Trust*, 741 F.2d at 516, answers the key objection raised by petitioners in *Haroco* without precluding recovery by primary, *i.e.*, direct, victims.

Historically, RICO treble damages were modeled on the treble damage provisions of the antitrust laws, but Congress did not incorporate the civil RICO provisions in those laws because of the different purposes of the two acts and the restrictive standing requirements of antitrust cases. "[Those] concepts that were borrowed from the Clayton Act, treble damages and injunctive relief, pertain to remedies rather than what is necessary to establish a claim under RICO." *Furman* v. *Cirrito*, 741 F.2d at 531.[11] Congress borrowed the concepts but not the structure nor, as

11. *Cirrito* was the third of the so-called "trilogy" of civil RICO cases decided by the Second Circuit on successive days. It was preceded on July 24, 1984 by *Sedima* and on July 25, 1984 by *Bankers Trust*.

Sedima concedes, 741 F.2d at 503, the restrictions of the antitrust civil remedies.

In interpreting the relevant language of § 1964(c), "injured in his business or property by reason of a violation of section 1962," *Sedima, Bankers Trust* and *Haroco* posit three different tests by which a RICO plaintiff must measure whether it can claim a "RICO" injury. *Sedima* and *Bankers Trust* have enumerated tests which require "something more" than, "distinct" or "different" from injury from the predicate acts alone (the "distinct injury requirement"), whereas *Haroco* argues for a test which only requires injury from the predicate acts ("predicate act injury").

Sedima imposes

> the obligation that the plaintiff show injury *different in kind from that occurring as a result of the predicate acts themselves,* or not simply caused by the predicate acts, *but also caused by an act which RICO was designed to deter.*

741 F.2d at 496. (Emphasis added). This formulation appears to be internally inconsistent by requiring injury *different in kind* from predicate act injury yet caused by an *act which RICO was designed to deter.* It would eliminate recovery in a situation where, for example, a defendant hired two brothers to cross state lines and set fire to several buildings owned by a single individual, and where the buildings were burned to the ground. In such a case, all the elements of a RICO violation are present,[12] yet the victim cannot recover treble damages because the injury *is*

12. *See* note 15, pp. 19-20.

the injury caused by the predicate acts. Congress cannot have intended to prevent civil RICO recovery under those facts.

Sedima further explains that the type of harm it believes the statute covers occurs only when "mobsters" do business through racketeering activities:

> RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors . . . . It is only when injury caused by this kind of harm can be shown, therefore, that we believe Congress intended that standing to sue civilly should be granted.

741 F.2d at 495-96. We submit that the "mobster"-type injury is simply an attempt to revive the "organized crime" requirement rejected by the Second, Fifth, Seventh and Eighth Circuit Courts.[13]

Sedima's formulation fails for additional reasons, which are more easily described in conjunction with an analysis of the *Bankers Trust* decision. In *Bankers Trust,* plaintiff loaned money to defendants, who then engaged in a series of bankruptcy frauds and frivolous suits as a result of which Bankers was not repaid. In describing RICO injury, the Second Circuit stated:

> A civil RICO complaint must allege "a distinct RICO injury" by which we mean that it must allege a pro-

13. *Owl Construction Co.* v. *Ronald Adams Contractor, Inc.,* 727 F.2d 540 (5th Cir.), *cert. denied,* 105 S.Ct. 118 (1984); *Moss* v. *Morgan Stanley, Inc.,* 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom., Moss* v. *Newman,* 104 S.Ct. 1280 (1984); *Bunker Ramo Corp.* v. *United States Business Forms, Inc.,* 713 F.2d 1272 (7th Cir. 1982); *Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1981), *cert. denied sub nom., Prudential Ins. Co.* v. *Bennett,* 104 S.Ct. 527 (1983).

> prietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation.

741 F.2d at 516. The court's analysis began with an articulation of three elements: "injury to the plaintiff, causation of that injury and the conduct that caused the injury." *Id.* at 515. Noting that the plaintiff's monetary loss constituted " 'injur[y] in [its] business or property,' . . . of the type contemplated by § 1964(c)," *Id.* at 516, and that "defendant's violation" had caused plaintiff's injury within contemplation of the phrase "by reason of," *id., Bankers Trust* then opined that "the difficulty lies in the nature of the conduct that caused Bankers's injury." *Id.* Addressing this question, the court stated:

> Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was "a violation of section 1962." We must therefore ask what conduct violates that section. Although, as detailed above, § 1962 has a number of facets, it is clear that it does not itself prohibit the predicate acts that constitute racketeering activity. Commission of two or more predicate acts is but an element of a § 1962 violation. *Indeed, § 1962 does not even prohibit a pattern of racketeering activity, without more.* Rather, there is a violation of § 1962 only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury.
>
> The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by *its use of a pattern of racketeering activity in connection with a*

> *RICO enterprise,* the injury cannot be said to have been caused by "a violation of Section 1962." *See Sedima, S.P.R.L.* v. *Imrex Co.,* 741 F.2d 482 at 494 (2d Cir. 1984). . . . [A] civil RICO plaintiff must allege "a distinct RICO injury," by which we mean that it must allege a proprietary injury caused by a RICO violation not just one caused by some of the essential elements of a RICO violation.

Id. (Emphasis added, footnotes omitted) Up to this point, the court had simply articulated RICO injury, not injury different from that caused by the predicate acts and unlawful involvement in an enterprise. But the court then went astray, building on Sedima's analysis, in articulating a distinction without a difference:

> Bankers argues that it is conceptually impossible to make any distinction between injury flowing from the predicate acts and injury flowing from a pattern of racketeering activity because a plaintiff injured by the predicate acts is *ipso facto* injured by the pattern. We disagree. If a plaintiff's injury is caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be the but-for cause of the injury.

741 F.2d at 517. (Emphasis in original).

This argument builds into the law niceties surely no legislator intended, and it is unsound. There is simply no requirement in the statute that injury caused by the pattern *exclude* or *differ* from injury caused by the predicate acts. The rationale for the requirement of a pattern was simply that repeated racketeering activity[14] as opposed to a single

14. Except for collection of an unlawful debt, which requires a single occurrence for RICO culpability.

instance thereof, alone suffices for imposition of concededly strong RICO remedies. The pattern element should not be used to prevent recovery where injury from the predicate acts and injury from the pattern coalesce, so long as the other elements of a RICO violation are present.

Moreover, this argument is *reductio ad absurdum*. The plain language of the statute requires a showing of injury *by reason of the § 1962 violation* and not merely by reason of the *pattern of racketeering activity*. However, following *Bankers Trust's* logic, if plaintiff is injured by the *pattern*, he is "injured regardless of whether or not there is a [§ 1962 violation] hence he cannot be injured *by* the [§ 1962 violation] and the [§ 1962 violation] cannot be the but-for cause of the injury." 741 F.2d at 517. This formulation of "but-for" causation theory produces the absurd result of removing from the civil protection of the statute those very persons whose injuries the law was enacted to prevent.

While it is conceptually possible, in some factual circumstances, to distinguish injury from the predicate acts and injury from the pattern, it is objectionable to do so where the plain meaning of the statute does not support it and where it eliminates redress for injury caused by RICO violations. The types of injury *Bankers Trust* suggests as injury contemplated by § 1964(c) illustrate the folly of this distinction.

Having adopted *Sedima's* but-for formulation, *Bankers Trust* then sets forth examples which, in fact, depart from the rationale of its own rule. It proposes "a number of circumstances in which injury could be *attributable to a pattern but not to the individual predicate acts.*" *Id.* at

517. (Emphasis added). The first example involved cancellation of a fire insurance policy after repeated arsons and *subsequent uncompensated accidental fire damage.* The second example involved predicate acts that resulted in interruption of sales, *causing plaintiff to borrow additional funds or to take on an unwanted business partner.* Neither of the underscored events reflects injury attributable only to the *pattern* and not "to the individual predicate acts." The additional facts reflect instead injury caused by fortuitous events over which defendant had no control or occasioned by the vulnerable condition of the plaintiff. Had the fortuitous event never occurred, or had plaintiff been financially sound enough to continue without taking loans or adding partners, defendant would have escaped treble damage liability. This analysis precludes suits by primary victims, even conceding that a RICO violation has occurred, and prevents recovery for the very type of injury " 'the statute was intended to forestall,' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977) *quoting Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967), absent other circumstances which do not themselves constitute RICO elements.

We assert that the correct interpretation of the "by reason of" language requires simply that (a) plaintiff plead and prove a RICO violation and (b) plaintiff plead and prove injury *proximately caused* by a confluence of the elements of a RICO violation, not merely by reason of the predicate acts.[15] This reading sufficiently answers the ob-

15. In this regard, *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d at 17, provides analytical guidance, stating:

> To state a claim for damages under RICO a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962 (1976), commonly known as "criminal RICO." In doing so, he must allege the existence of seven constituent elements: (1) that the

(footnote continued on next page)

jection that injury must be caused by violation of § 1962 and not merely by the predicate acts set out in § 1961,[16] without thereby going beyond the purposes of RICO to require "something more," "different" or "distinct." This last requirement, often necessarily dependent on some fortuitous or unforeseeable event or circumstance, countermands established notions of proximate cause, and, ironically renders compensable some injuries which ordinary tort law would deem too remote by virtue of their foreseeability.

Additionally, it does not resolve the core complaint raised by *Sedima*—that taking RICO at *face value* results in unjustifiable federalization of "garden-variety" fraud and other state claims. Nor does it provide a line of de-

(footnote continued)

defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. 18 U.S.C. § 1962(a)-(c) (1976). Plaintiff must allege adequately defendant's violation of section 1962 before turning to the second burden—i.e., invoking RICO's civil remedies of treble damages, attorneys fees and costs. *See Bays* v. *Hunter Savings Association*, 539 F.Supp. 1020, 1023 (S.D. Ohio 1982). To satisfy this latter burden, plaintiff must allege that he was "injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964 (c) (1976) (emphasis added).

Thus, a RICO plaintiff must first allege, and ultimately prove, all seven elements of a § 1962 violation, *i.e.*, must sufficiently prove a claim under RICO. Plaintiff's next burden is to prove injury "by reason of" that violation.

Obviously, plaintiff may fail to establish any of those elements and never reach the issue of injury. For example, in fraud cases, plaintiff may be unable to prove the criminal intent necessary for suits under the mail or wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, thus failing to prove racketeering activity. In *Moss*, plaintiffs failed to prove that the objectionable conduct relating to the underlying securities transactions was fraudulent. *Id.* at 16.

16. In this regard, we submit that *Haroco* does not go far enough, because it does not require injury from *all* of the elements of a RICO violation, as set out in *Moss*.

marcation which is any more meaningful or any more capable of discriminating between "garden-variety" and other forms of fraud than the statute itself. Rather, the distinct injury rule virtually guarantees that plaintiffs will drift even further from the purpose of RICO and engage in ever more imaginative pleading in the search for "something more," "different," or "distinct" to qualify for civil RICO recovery.

Moreover, as a practical matter, the distinct-injury requisite raises additional issues regarding a civil RICO statute of limitations. By requiring circumstances or events other than injury from the predicate acts, the distinct-injury requirement eliminates any reasoned approach to statute of limitations concerns, already an area rife with controversy,[17] and raises the spectre that any RICO offense may be turned into a continuing violation. Were the *Bankers Trust* examples followed, defendants would forever be subject to RICO claims based on fortuitous, often innocuous events which they had not set in motion and over which they exercised no control.

In sum, the distinct-injury requisite creates far more problems than it purports to resolve while eviscerating the salutary purposes for which the statute was enacted. It supplants the plain and accepted meaning of "by reason of" as a statement of causality, destroys rational expectations of recovery, and requires the subsequent occurrence of

17. *Compare, e.g., Seawell* v. *Miller Brewing Co.*, 576 F. Supp. 424 (M.D.N.C. 1981) (applying state three-year limitations period for violation based upon a liability created by statute) *with, e.g., Umstead* v. *Durham Hosiery Mills, Inc.*, 578 F. Supp. 342 (M.D.N.C. 1984) (RICO action by dissenting shareholders alleging mail fraud, wire fraud and fraud in the sale of securities governed by the two-year securities fraud limitation period or the three-year period for fraud).

unforeseeable events during some open-ended period before primary injury can be redressed—all without the merest shred of statutory or legislative support. This Court should decline to endorse a reading of this statute which so evidently creates such untoward results.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should grant the relief requested in the petition of Sedima, S.P.R.L. and reverse the ruling of the court below.

Respectfully submitted,

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APPENDIX

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §§ 1961-1964 (1978) (RICO)

(relevant portions reprinted herein)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of il-

legal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal

law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . .

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an un-

lawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest

subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interestate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.